

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Vernal Enterprises, Inc.	)	Fee Control No. 9605218195242001
Fee Payment for Application for FM Channel	)	
277 B1 Facilities in Brookville, Pennsylvania	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** June 27, 2002

**Released:** July 23, 2002

By the Commission: Commissioner Copps dissenting and issuing a statement.

**I. INTRODUCTION**

1. The Commission has before it an Application for Review filed by Vernal Enterprises, Inc. Vernal seeks review of a decision of the Office of Managing Director denying Vernal's request for a refund of the \$2,335.00 filing fee it paid in connection with its application for new FM Channel 277 B1 facilities in Brookville, Pennsylvania.<sup>1</sup> For the reasons below, we deny the Application for Review.

**II. BACKGROUND AND DISCUSSION**

2. On May 20, 1996, Vernal filed an application for an FM radio station construction permit for FM facilities in Brookville, Pennsylvania. Vernal's application was mutually exclusive with other applications. Vernal filed its application prior to the enactment of the Balanced Budget Act of 1997, which amended section 309(j) of the Communications Act (Act), 47 U.S.C. §309(j), to require competitive bidding, rather than comparative hearings, to award licenses to mutually exclusive applicants for commercial broadcast licenses. The Balanced Budget Act, however, also amended the Act to add a new section 309(l), 47 U.S.C. §309(l), that authorized the Commission, in its discretion, to use competitive bidding or comparative hearings to award licenses to pending mutually exclusive broadcast applicants if the competing applications had been filed prior to July 1, 1997. In addition, section 309(l) provided for a 180-day period during which such pre-July 1 broadcast applicants could enter into settlement agreements that would resolve mutual exclusivity and be entitled to mandatory waivers of FCC rules limiting the amount of settlement payments between the applicants. Vernal and its mutually exclusive applicants took advantage of these provisions and, in January 30, 1998, filed a settlement agreement with the Commission. The agreement was subsequently approved and

<sup>1</sup> Letter from Mark Reger, Chief Financial Officer, Office of Managing Director, FCC to Larry Schrecongost, President, Vernal Enterprises, Inc. (dated Jan. 14, 2002) (*January 14 Letter Decision*).

resulted in the dismissal of Vernal's application on April 16, 1998, and award of the license to the remaining applicant.<sup>2</sup>

3. Subsequent to the filing (and approval) of the settlement agreement, the Commission completed a rulemaking proceeding in August, 1998, in which it determined that any remaining pre-July 1, 1997 broadcast applications should be awarded by competitive bidding.<sup>3</sup> The Commission stated, however, that "pending applicants in all comparative licensing cases subject to resolution by competitive bidding pursuant to Section 309(l) may file a pleading disavowing intent to participate in the auction and seek dismissal of their applications."<sup>4</sup> The Commission further stated that, "[o]nce dismissal of any such application is final, we will entertain requests for refunds of any hearing and filing fees actually paid by such applicants."<sup>5</sup>

4. Vernal claims that it is entitled to a refund of the filing fee under the *First Report and Order* because the Commission dismissed Vernal's mutually exclusive application for the new FM facilities after granting on April 16, 1998 the settlement agreement filed by Vernal and its mutually exclusive applicants on January 30, 1998. Vernal contends that a grant of its refund request would be consistent with the Office of Managing Director's grant of refund requests from similarly-situated applicants whose mutually exclusive applications had been dismissed following the Commission's approval of settlement agreements.

5. In *Applications of Wade Communications, Inc., Ellen R. Evans d/b/a Heartland Communications, and B.R. Clayton and Martha S. Clayton d/b/a Middleton Radio*, Memorandum Opinion and Order, 6 FCC Rcd 20,708 (2001) (*Wade MO&O*), the Commission held that the *First Report and Order* "clearly state[s] our intention that refunds of filing fees would only apply to the remaining pre-July 1, 1997 applicants for licenses or permits who had not resolved mutual exclusivity through negotiated agreements during the 180-day period [*see supra* para. 2] and whose pending mutually exclusive applications would therefore be resolved pursuant to our decision to use competitive bidding."<sup>6</sup> The permit for which Vernal applied, in contrast, was not awarded by auction but pursuant to the settlement agreement which Vernal and its mutually exclusive applicants entered into during the 180-day period and prior to the Commission's decision in the *First Report and Order* (and which the Commission approved prior to its decision in the *First Report and Order*).

6. Vernal is correct that several fee refund decisions by the Office of Managing Director are inconsistent with the *First Report and Order* and the Commission's subsequent decision in the *Wade MO&O*. At the same time, we note that there are several decisions by the Office of Managing Director contemporaneous with those cited by Vernal in which the Office of

<sup>2</sup> See *Notice of Action on FM Broadcast Settlement Agreements and Applications*, Report No. 44221A (released Apr. 16, 1998) (*April 16 Notice of Action*).

<sup>3</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, *First Report and Order*, 13 FCC Rcd 15920, 15931-32 (1998) (*First Report and Order*).

<sup>4</sup> *Id.* at 15957.

<sup>5</sup> *Id.*

<sup>6</sup> *Wade MO&O*, at para. 7 (citing *First Report and Order*, 13 FCC Rcd 15920, 15957); see also *id.* at para. 8 ("nothing in the *First Report and Order* indicated that refunds of filing fees would be granted to applicants that had already settled and resolved mutual exclusivity during the 180-day period").

Managing Director denied application fee refund requests from applicants similarly-situated to those cited by Vernal.<sup>7</sup> The Commission's *Wade MO&O* resolved the conflict among these differing rulings, making clear that refunds of application fees are limited to those situations in which the sought-after permit was awarded by auction. As noted above, the permit involved in Vernal's situation was not awarded by auction, and therefore the earlier decisions cited by Vernal are entitled to no weight here. After careful review of the issues raised in the Application for Review, we therefore find no basis for modifying the decision of the Office of Managing Director denying Vernal's request for a refund of its application filing fee.

### III. ORDERING CLAUSE

7. ACCORDINGLY, IT IS ORDERED that the Application for Review filed on February 13, 2002 by Vernal Enterprises, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

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<sup>7</sup> See Letters from Mark Reger, Chief Financial Officer, Office of Managing Director, FCC, to Timothy K. Brady, Esq. (all three letters dated Nov. 18, 1999) (denying application fee refund requests of Ellen R. Evans (d.b.a. Heartland Communications), B.R. and Martha S. Clayton (d.b.a. Middleton Radio), and Wade Communications, Inc.). The applicants' appeal of these November 18, 1999 decisions was denied by the Commission in *Wade MO&O*.

**DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS**

*In the Matter of Vernal Enterprises, Inc. Fee Payment for Application for FM Channel 277 B1  
Facilities in Brookville, Pennsylvania*

Given the balance of equities here, I would grant Vernal's request for a refund. The majority's decision seems to me to be based upon a convoluted interpretation of a decision issued by the Commission *after* the settlement at issue. Given the after-the-fact nature of this decision, and the acknowledged inconsistencies regarding refunds already granted by the Commission, I dissent from the Order denying the request for a refund.